OCT 30 1967 SUPREME COURT, U. S.

No. 64

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

UNITED ARTISTS CORPORATION,

Appellant,

—v.—

CITY OF DALLAS,

Appellee.

ON APPEAL FROM THE COURT OF CIVIL APPEALS FOR THE FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF THE AUTHORS LEAGUE OF AMERICA, INC. AS *AMICUS CURIAE*

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

The Authors League of America, Inc. respectfully petitions for leave to file the annexed brief *amicus curiae* in this proceeding.

The Authors League is a national society of professional writers and dramatists. One of its principal purposes is to express the views of its members in cases inolving the rights of free speech and press. Because determination of the issues involved in this case will significantly affect those fundamental rights, the Authors League respectfully applies for leave to file its brief *amicus curiae.*

Counsel for the Applicant is familiar with the questions involved in this case, and the scope of their presentation, and believes that there is necessity for additional argument on the points specified in the League's *amicus* brief.

The Authors League respectfully submits that this appeal presents a threshold Constitutional issue which precedes those involving the substantive and procedural defects of the Dallas ordinance. In its brief the Authors League urges that a local ordinance regulating the exhibition of a motion

picture is, per se, a violation of its producer's freedom of speech and press, and right to Due Process. We believe that the arguments on this point, in the League's brief, are germane to this appeal.

The League's brief also contends that the Ordinance is defective for failure to provide adequate safeguards to the exhibitor who admits a child under age through mistake or the child's misstatement of his age. Finally, the brief urges that if a departure is made from present *Roth* Standard, when defining obscenity for children, that the Court adopt a definition based upon Mr. Justice Stewart's description of "hard-core pornography" in *Ginzburg* v. *United States*, 383 U. S. 463. This would be easier to apply and less likely to produce unconstitutional restraint than would a concept of "variable obscenity" or variable "prurient interest." The Authors League believes that the discussion of these points in its brief may contribute to the consideration of the fundamental issues posed by this appeal.

Counsel for the Authors League has been advised by Appellant's attorneys that they have no objection to the filing of the within brief *amicus curiae*. Counsel for Appellee has advised the League's attorney that he does object to the filing of the brief.

Because the Authors League of America believes that the issues involved here are of vital concern to writers as well as motion picture producers and exhibitors, it respectfully requests permission to file the within brief *amicus curiae*.

Respectfully submitted,

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Attorney for The Authors League of America, Inc., Amicus Curiae

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BRIEF OF THE AUTHORS LEAGUE OF AMERICA, INC., AS *AMICUS CURIAE*

Introductory Statement

The Authors League believes that this appeal raises issues of vital concern to authors, publishers and others concerned with preserving freedom of speech and press. We submit that the Dallas ordinance, in substance and in its procedural requirements, infringes those rights. But we also believe that the ordinance violates the First Amendment in two other important respects. It denies the creator of a motion picture the right to defend his freedom of speech. And, because it is a local ordinance, it is *per se* an unconstitutional restriction on free speech and press (regardless of its terms). We believe that the problem of multiple regulation of freedom of speech, and the restrictive effects inherent in such a system, is one of the most serious challenges to First Amendment freedoms.

POINT I

A local ordinance regulating the exhibition of a motion picture, per se, violates its producer's constitutional freedoms of speech and press, and right to due process.

We respectfully submit that a city, town or other political subdivision of a state cannot impose any regulation—including classification—upon the exhibition of a motion picture to adults or children, without thereby infringing the producer's constitutional rights of free speech and press under the First Amendment; and his right to due process of law under the Fourteenth Amendment.

Such a violation occurs even if the regulation might, in substance and procedural safeguards, be constitutionally proper when adopted by the state itself. (For reasons indicated below, Point III, we believe that the Dallas ordinance is also constitutionally defective in substance and procedural safeguards.) Local-option regulation of motion pictures permits a system of multiple restraints that would effectively destroy the producer's right of free speech in many areas, although his motion picture was entitled to First Amendment protection.

Underlying this contention are three premises: (i) the producer's right of free speech is endangered by local regulatory ordinances; (ii) he is entitled to defend against them, even when they are directed at exhibitors; (iii) adverse classifications for children restrict his right of free speech. We discuss these first.

(i) The Producer's Right of Free Speech Is At Stake.

Although the Dallas ordinance, by its terms, applies to local exhibitors, it unquestionably affects the First Amend-

ments rights of each producer whose motion pictures are shown in Dallas; and the distributors who circulate them. As this Court noted in *Bantam Books* v. *Sullivan,* 372 U.S. 58, 64, n. 6 (1963), freedom of the press protects circulation, as well as publication, of books; and the direct result of a restrictive regulation aimed at local book stores is curtailment of the publisher's right of freedom of press.

The same causal relationship, and restrictive effect upon the producer's constitutional rights, exists here. His freedom to speak, to make and communicate his motion picture to the public, can be curtailed by restricting his right to have it circulated, through a burdensome system of restraints—ostensibly aimed at local exhibitors who are the essential link in his chain of communication to the public.

(ii) The Producer Is Entitled to Defend Against Such Regulatory Ordinances.

In *Freedman* v. *Maryland,* 380 U.S. 51 (1965), as in *Bantam Books* v. *Sullivan, supra,* the Court recognized that a producer is entitled to defend his constitutional rights against statutes which restrict them by limiting local exhibition of his motion picture.

(iii) An "Unsuitable" Classification Restricts the Producer's Right Of Free Speech.

A classification of "unsuitability" for children restricts a producer's rights, whether it is imposed after contest—or by default (attributable to onerous burdens of compliance, or of contesting adverse board actions).

If the motion picture is constitutionally protected for viewing by children, its producer's right to have it exhibited to them is restrained by the board's improper classification "not suitable for young persons." The label also

impairs his right to have it exhibited to adult audiences. The local exhibitor may refuse to show it at all, once it is labelled "unsuitable," for fear of risking community pressures, or fear of penalty if he inadvertently admits an under-age child. Moreover, some adults within the community may accept the adverse label as evidence of immorality or impropriety which would keep them from seeing the picture.

Equally important, adverse classification restricts not only the rights of the producer, the distributor and local exhibitor—but also the rights of children and adults who wish to see the picture, or have their children see it, and are thus denied the opportunity because of improper classification. (Cf. *Lamont* v. *Postmaster General,* 381 U.S. 301, 308.)

(iv) A Local Ordinance Regulating Motion Picture Exhibition is Per Se Unconstitutional.

The producer's constitutional right to have his motion picture exhibited can be seriously impaired, if not totally destroyed, if regulations affecting that right—including classification—can be imposed by governmental subdivisions below the State level. The door would then be open for a system of multiple restraints which could effectively prevent the producer from contesting adverse decisions, or coerce him into accepting them—even assuming each regulation was in form and substance, constitutional.

What Dallas can do, other cities and communities can do. Even if classification regulations were adopted only by Texas cities with populations in excess of 50,000, a producer would have to comply with some twenty separate regulations, and face the prospect of twenty separate injunction proceedings, if all the boards issued an "unsuitable" classi-

fication for a given picture. If more Texas cities decided to adopt ordinances the producer would have dozens of regulations to comply with, and suits to contend with, on any one picture. It would not be difficult for smaller cities to copy their larger sisters; they could borrow (verbatim) the ordinances, the rulings in particular cases, even the same court papers.

If Texas can delegate whatever powers of regulation it may exercise to all of its cities, so may the other states. Instead of a maximum of fifty state statutes, a producer would have to comply with many times that number of local ordinances—and the number of suits he might face should he refuse adverse classifications could be tremendous (for any one picture). There are 132 cities with populations over 100,000; 333 with populations over 50,000; and 765 with populations over 25,000 (p. 16, Statistical Abstract of the United States, 1967). If only a portion of these adopted ordinances—to say nothing of smaller cities or counties—the producer's right to defend his freedom of speech would be obliterated.

The very existence of many ordinances creates the threat that several suits would be brought against the producer if he did not accept adverse classifications—the threat that he would have to bear an enormously heavy financial burden of defense if he chose to defend his right of free speech. And, the threat would exist even if the producer were not required to file objection to the ruling.

In *Time, Inc.* v. *Hill,* 385 U.S. 374, this Court emphasized that restraint on freedom of speech can be imposed by "fear of the expense involved" in the defense of suits and that this threat "must inevitably cause publishers to 'steer . . . wider of the unlawful zone.' *New York Times Co.* v.

Sullivan, 376 U. S. at 279." (p. 389) In *Time, Inc.* v. *Hill*, it was a State statute which created, among other deterrents, the threat of expense in defending one's constitutional rights against civil suits. Here, the threat of expense would be created by a myriad of statutes under which many proceedings could be brought against a non-complying producer, his distributors or the local exhibitors of his motion picture. We submit that regulations, which thus inherently create coercion through economic duress, are as unconstitutional as those involved in *Time, Inc.* v. *Hill* and *New York Times Co.* v. *Sullivan*. Moreover, such a system, by the sheer weight of its burden and impossibility of compliance, violates the producer's right to Due Process of Law under the Fourteenth Amendment.

When a producer is compelled to accept an "unsuitable" classification, by default, because the burden of opposition is too great to bear, he has been subjected to a restraint—just as much as if he had been enjoined or penalized by a court. This constitutional defect of the local-option system of regulation cannot be excused on the ground that the producer could have avoided the burden by leaving the defense to each local exhibitor. His right to defend the freedom to exhibit his motion picture is an integral aspect of his right of freedom of speech (*Bantam Books* v. *Sullivan*, *supra*). To deprive him of the right of defense is to deprive him of the right of free speech.

In *Louisiana* v. *N.A.A.C.P.*, 366 U. S. 293, 296, the Court said:

> "We are in an area where, as *Shelton* v. *Tucker*, 364 U. S. 479, emphasized, any regulation must be highly selective in order to survive challenge under the First Amendment. As we there stated: '. . . even

> though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.' "

Assuming the Court were to believe that Texas could regulate the exhibition of motion pictures to children (under a properly drawn statute), we submit that "this governmental purpose . . . cannot be pursued" by allowing cities and other political subdivisions to adopt such regulations—for that is a "means that broadly stifles the fundamental personal liberties when the need can be more narrowly achieved."

Even in the unlikely event that all local review boards accepted a producer's classification of his motion picture, a system of multiple regulation—by the sheer weight of its administrative burden—would inhibit his right of free speech, in violation of the First Amendment. As Mr. Justice Brennan emphasized in *Lamont* v. *Postmaster General*, 381 U.S. 301, "inhibition as well as prohibition" of free speech is banned by the First Amendment. Regulation under a multiple system would be so burdensome as to be totally stultifying. To protect his rights, the producer or his national distributor, would have to file classifications in each jurisdiction, or be certain his exhibitor filed correctly; provide the information required by local ordinances; and be certain that other requirements were also met. Under a multiple system, the burden would not be limited to a maximum of 50 (State) regulations and administrative procedures; it would involve 100 or 300 or more local regulations. And the burden would be magnified enormously if various communities adopted different substantive provisions, different classifications, different age lim-

its, different time limitations, and different procedural rules.

It is true that regulation of motion pictures (to the extent it is constitutionally permissible) at the State level would preclude application of "community standards" on a local basis. But whatever benefits local standards might have, for the producer or the censor, they are heavily outweighed by the dangerous restrictions on free speech inherent in a system of multiple regulation. Moreover, it is very doubtful that local standards vary considerably in the case of motion pictures.

Motion pictures now reach far greater audiences on television than in theatres. On television, a motion picture crosses city and county boundaries; broadcast by one station, it can reach into millions of homes in several States; and a network broadcast can bring it to the vast majority of television sets in the United States. Even if local standards did differ from one city in Texas to another (or from Texas to neighboring States), television completely ignores these differences and will change them, if it has not already done so.

While Dallas teenagers were barred from seeing VIVA MARIA in theatres, television (on September 30, 1967) brought them the movie NEVER ON SUNDAY—"... the sophisticated story of an engaging prostitute ... who insisted on resting on the seventh day ..." (Jack Gould in THE NEW YORK TIMES, Oct. 2, 1967, p. 95). VIVA MARIA was innocuous in its own right; by comparison to NEVER ON SUNDAY it is almost puritanical. Even had the Dallas ordinance applied to television broadcasts of motion pictures, it would not have suppressed NEVER ON SUNDAY, since that reached Dallas through a broadcast by an NBC affiliate in neighbor-

ing Forth Worth. Unless Dallas parents who were not at home that Saturday had locked their television sets in closets, or dismantled them, their children were free to see Miss Mercouri's portrayal of the "engaging prostitute."

POINT II

The ordinance is void for failure to provide notice, or right of defense, to the producer.

The Dallas ordinance violates the producer's rights under the First and Fourteenth Amendments because it does not require notice to him of an adverse classification, or grant him the right to defend proceedings instituted against his motion picture. As we have contended (pages 5-6, supra), the ordinance directly affects the producer's freedom of speech; and his right to defend that freedom is an integral part of it. The ordinance does not provide him the opportunity to exercise this right.

The producer, or the distributor to whom he has assigned national distribution, must be allowed to contest adverse classifications or other restrictions imposed upon local exhibitors of his film. As this Court has pointed out in *Freedman* v. *Maryland,* 380 U.S. 51, the local exhibitor is not likely to defend the right of unrestricted exhibition of a film as vigorously as its producer. (See also *Bantam Books* v. *Sullivan,* 372 U.S. 58, 64 n.). (Indeed, the exhibitor may not even have the same view as to the nature of the picture.)

The local exhibitor cannot be expected to shoulder the financial burden of an administrative proceeding and court action, to defend each motion picture which receives an adverse classification. The cost of defense may not, to him, be worth the difference in box office receipts. He must cal-

culate his costs in terms of several motion pictures he shows during each year and, therefore, the several possible such proceedings. And he must realistically assume that resistance to the local board is likely to produce adverse classifications where they might not otherwise have occurred.

Moreover, the exhibitor, rooted in the community, is far more exposed to social pressures that may lead him to accept adverse classifications of constitutionally protected films and/or refuse to exhibit them. He may not wish to "sustain the accompanying stigma which attaches even though [the picture] may be ultimately found ['suitable' for children]" *Zeitlin* v. *Arnebergh*, 59 C. 2d 901, 906; 383 P. 2d 152, 155. He may not wish to incur the risk of an administrative hearing or an injunction proceeding ". . . since that entails adverse publicity and physical and mental strain as well as expense, even though the prosecution should ultimately terminate" in a finding that the picture was suitable for children. *Bunis* v. *Conway*, 17 A. D. 2d 207; 234 N.Y.S. 2d 435.

The fact that *Interstate Circuit* fought the Dallas ordinance in this test case does not mean that it could afford to continue to do so on a picture-by-picture, or city-by-city basis, should the ordinance be sustained, and spread from community to community. Nor does it follow that the individual owner of a single theatre could afford to shoulder the same burdens as a chain of theatres.

A system of regulation, like the Dallas ordinance, which denies the producer the right of defense, or by its burdens (or other indirect means) compels him to abdicate that function to the local exhibitors of his film, denies his rights of free speech under the First Amendment, and his right to Due Process under the Fourteenth Amendment.

POINT III

The ordinance does not provide the procedural safeguards required by the First and Fourteenth Amendments.

Appellant's brief discusses the ordinance's glaring omission of the procedural safeguards required by the First and Fourteenth Amendments to protect the rights of the producer and the exhibitor. These include: compelling the exhibitor to file a notice of "non-acceptance" to protect his rights; relieving the Board (in the event of non-filing) of the fundamental duty to commence a judicial proceeding, should it determine to impose an adverse classification; and (assuming filing could be justified), allowing an inordinately short time for filing the notice of non-acceptance. And, as Judge Cox pointed out, *Interstate Circuit, Inc.* v. *City of Dallas,* 366 F. 2d 590, 610, the ordinance does not provide or require the prompt hearing and disposition of actions brought by the Board—a fundamental safeguard of First Amendment rights in this area.

Moreover, the ordinance does not provide other required safeguards. By imposing liability for admission of children under a specified age, the statute imposes a formidable deterrent upon the exhibitor; one that cannot be excused by analogy to statutes which restrict conduct unaffected by the First Amendment, such as the sale of liquor to minors (cf. *Smith* v. *California,* 361 U.S. 147, 152-153). To avoid liability for inadvertently admitting a 14 or 15-year old, who has falsely stated he is 16, the exhibitor would have to make considerable efforts to obtain satisfactory evidence of the age of each child admitted—and to preserve the evidence, in case he is prosecuted. In the face of the very con-

siderable burden and risk thus involved in showing a picture classified as "not suitable," the easy alternative for the exhibitor would be not to show the picture. The liquor store whose entire stock is banned to children has no choice; but the exhibitor has a choice between "suitable" and "unsuitable" pictures. It is, indeed, the choice which makes the risk of inadvertently admitting children under 16 too great to take—and which makes the penalty such a serious restraint on pictures intended for an adult audience.

The Dallas ordinance partially recognizes this problem; and seeks to dissuade lying by punishing the child who misstates his age. But this does not provide a sufficient margin of error for the protection of the producer's and exhibitor's rights of free speech. If a child of 9 states he is 16, an exhibitor could not believe him. But a 14-year old child may well look 16 (and may have borrowed evidence to support his lie). An exhibitor should be entitled to rely on a child's statement of his age so long as it is not beyond some prescribed and reasonable boundary of belief—for example, so long as a child's actual age is within three years of the statutory minimum. And the ordinance should explicitly provide this safeguard.

POINT IV

The ordinance restricts the exhibition of motion pictures protected by the First Amendment and is therefore unconstitutional.

In *Interstate Circuit, Inc.* v. *City of Dallas*, 366 F. 2d 590, the Court of Appeals dealt with two central issues. *First*, whether the ordinance could restrict the exhibition of a motion picture to children on grounds other than obscenity;

and, *second*, whether the ordinance could restrict exhibition to children on grounds of obscenity—if the definition of obscenity varied from the one used in appraising films for adult audiences.

Although we believe that the unconstitutionality of the Ordinance is established on other grounds before either of these questions need be reached (POINTS I, II and III, *supra*) and that the Dallas ordinance does not even raise the issue of defining obscenity for children, we respectfully submit our views on these fundamental questions, in the event the Court considers them despite the preliminary, fatal defects of the Ordinance.

(i) The Ordinance Is Unconstitutionally Broad and Indefinite.

The Dallas ordinance poses the two threats to free speech and due proces which were condemned in *Winters* v. *New York*, 333 U.S. 507.

First, it includes "prohibitions against [films], protected by the principles of the First Amendment" (333 U.S. at 509) against any restriction—whether aimed at children or adults. Its broad clauses encompass films that could not be classified as obscene for children. And, even assuming the First Amendment did not protect certain depictions of violence when exhibited to children—the ordinance would restrict films that could not conceivably be squeezed into any definition of "violence" that could be drawn consistent with the First Amendment.

Second, the ordinance "fails to give fair notice of what [films]" will be restricted for exhibition to children (333 U.S. at 509). A producer who wishes to make a film "suitable" for Dallas children could not determine, while pre-

paring it, whether it would satisfy the ordinance. The prohibitions are too vague, ambiguous, and uncertain. In the end, they depend solely on the Board's "judgment" as to whether the film will create "impressions" in children that broad categories of conduct are "profitable, desirable, acceptable, praiseworthy or commonly accepted."

Neither the producer nor an exhibitor could determine, from the ordinance, how to classify a film; or whether an adverse classification by the Board was proper. Nor could the Board find in the ordinance any meaningful guidance for its actions.

(ii) Dallas Cannot Restrict the Exhibition To Children of Films That Are Non-Obscene.

We submit that Judge Thornberry was correct in ruling that a city or state cannot restrict the exhibition of motion pictures to children on grounds other than obscenity; and that other classes of films were protected by the First Amendment, and therefore could not be reached—as could obscenity—by the Dallas ordinance. "Violence," "crime" and "brutality," and semantic variations of these terms, are not among the "well defined and narrowly limited classes of speech" which the Court has held are beyond the protections of the First Amendment (*Chaplinsky* v. *New Hampshire,* 315 U.S. 568). Mr. Justice Reed's opinion in *Winters* v. *New York, supra,* underlines the great risks to free speech and due process inherent in attempting to define such a class of material and deny it the protection of the First Amendment. Those dangers have not abated.

As the Court of Appeals noted: "The long history of the misuse of the censorship power . . . [and] the activities of the censors in the context of total censorship statutes . . ."

make it much too dangerous to withdraw First Amendment protection from classes of speech other than obscenity; and as it also noted, "The child's freedom of speech [is] too precious to be subjected to the whim of the censors (356 F.2d 599).

(iii) The Class of Films That Can Be Restricted For Children, As Obscene, Must Be Clearly Defined.

In *Jacobellis* v. *Ohio,* 378 U.S. 184 (1963), Mr. Justice Brennan suggested that the states consider whether the preferable method of "preventing the dissemination of *material deemed harmful* to children" might be to adopt "laws aimed specifically at preventing the distribution of *objectionable material* to children, rather than at totally prohibiting its dissemination" (p. 195). (Emphasis supplied.)

We respectifully submit that Judge Thornberry was correct in concluding that "harmful" or "objectionable material" was synonymous with "obscene material." However, we disagree with his conclusion that "obscenity" should be measured by variable standards; that it should be determined by "the prurient interest of its intended and probable recipient group." (366 F.2d 590, 596)

A statute, such as the Dallas ordinance, applies to children of all ages—up to 16. Obviously, the "prurient interest" of a child of 10 is not the same as that of a child of 16; it is radically different.

More important, to add to the "obscenity" standard for films, a test of their "appeal" to the "prurient interest" of children, is to add another ambiguous factor which will make the *Roth-to-Memoirs* standard even more difficult to use. Clearly, the standard is not now an easy one to

apply (*Jacobellis* v. *Ohio*, 378 U.S. 184, 187, 191; cf. *People* v. *Fritch*, 13 N. Y. 2d 119, 126). The difficulties are demonstrated by the journey of TROPIC OF CANCER through five state courts of appeal before this Court ruled it was not obscene (*Grove Press* v. *Gerstein*, 378 U.S. 577).

New York and Florida held it obscene; California, Wisconsin and Massachusetts held it was not obscene (*People* v. *Fritch, supra; Grove Press* v. *Gerstein*, 156 So. 2d 537; *Zeitlin* v. *Arnebergh*, 59 C. 2d 903; *Attorney General* v. TROPIC OF CANCER, 345 Mass. 11; *McCauley* v. TROPIC OF CANCER, 20 Wis. 2d 134). The New York judges divided 4 to 3; the Wisconsin judges divided 4 to 3. The two unanimous courts, California and Florida disagreed with each other. By way of contrast—New York which had held TROPIC obscene (4 to 3) ruled that FANNY HILL was not obscene (4 to 3); and Massachusetts, which had held TROPIC was not obscene (4 to 3), held that FANNY HILL was obscene (4 to 3) (*Attorney General* v. *A Book, etc.*, 349 Mass. 69; *Larkin* v. *Putnam's Sons*, 14 N. Y. 2d 399).

It seems obvious that even Justices of the highest state courts have judged a work by their own concept of propriety, rather than the *Roth* standard; and have then couched their findings in the verbiage of the standard. In *People* v. *Fritch*, 13 N.Y. 2d 119, the New York majority recited the elements of the *Roth* standard (p. 123) and said: "If, as the County Court held, (TROPIC OF CANCER) is not obscene as a matter of law, it is difficult to conceive when, if ever, a book can be held obscene under any established legal standard." (p. 124) But Judge Dye, in his dissenting opinion, said that the majority "decision now being rendered is no more than an expression of individual views, having no support aside from its own pronouncement." (p. 129)

If Appellate courts have had difficulty using the *Roth* standard, it is inevitable that local boards of review—passing on the fitness of motion pictures for children—will have greater difficulty. To add the element of variable "prurient interest" will merely give them a broader license, and excuse, for condemning pictures that do not meet their personal concepts of what children should see. It will not provide that precise guidance which is so essential to the protection of free speech (*Winters* v. *New York, supra*).

(iv) The Definition Should Be Based on Mr. Justice Stewart's Description of Hard Core Pornography

If the Court is to depart from the *Roth* standard in dealing with statutes regulating exhibition of "obscene" motion pictures for children, then we respectfully submit that it should consider whether the result might be better achieved by adopting a definition based on the description of "hard-core pornography" made by Mr. Justice Stewart in *Ginzburg* v. *United States,* 383 U. S. 463, 499. In enumerating the kinds of materials he meant by the term, Mr. Justice Stewart included:

> "photographs, both still and motion picture, with no pretense of artistic value, graphically depicting acts of sexual intercourse, including various acts of sodomy and sadism, and sometimes involving several participants in scenes of orgy-like character."

(Cf. *People* v. *Richmond News,* 9 N. Y. 2d 578, 587).

In motion pictures, unlike the published word, action is graphically depicted; and, it may therefore be possible to describe more specifically the types of depicted conduct which constitutes "obscenity", lying beyond the protection of the First Amendment. A definition based on Mr. Justice

Stewart's description of "hardcore pornography" would be less difficult to apply in regulations affecting the exhibition of obscene motion pictures to children. And, it would greatly reduce the opportunity for Board members to substitute their personal concepts of "suitability"—in the guise of interpreting the complex *Roth* standard or one made even more complex by the factor of variable "prurient interest." This would greatly minimize the danger that such regulations produce a 'total suppression of such material" or "reduce the adult population . . . to [viewing] only what is fit for children" (*Jacobellis* v. *Ohio*, 378 U. S. 184, 195).

We doubt that a definition of motion pictures "obscene" for children need move beyond the boundaries of Justice Stewart's definition, but wherever the line be drawn, we respectfully submit that it cannot be carried much beyond the limitations of his classification without affecting films which are by no means obscene for children and which present problems of taste and parental responsibility, rather than "obscenity" or a proven causal relationship to anti-social conduct.

Indeed, the Dallas ordinance implicitly recognizes that the kinds of films which it seeks to restrict do not pose the threat of obscenity, but rather involve questions of parental judgment as to taste. The ordinance provides that it shall not be an offense to admit a child under 16 to a film classified as "not suitable" if he is accompanied by his parent or guardian. Obviously, the state would not allow a parent to take his child to an *obscene* film—it does not allow the parent himself to attend one. Under the Texas obscenity laws a theatre owner prosecuted for exhibiting an obscene motion picture to an adult audience could not

defend on the ground that the adults had attended voluntarily. [Vernon's Ann. P.C. Art. 527].

Dallas thus recognizes that it is essentially the parent's responsibility to decide whether his child should attend motion pictures affected by the Ordinance. But it only allows the parent to make the choice when he accompanies the child. Otherwise, it makes the choice for him; and shifts the burden of enforcing it from the parent to the exhibitor. It does not allow the parent to decide his children may see the film when he does not accompany them. Nor does it recognize a parent's responsibility to prevent his child from attending films he does not want him to see—i. e., to control his child's conduct when the child is away from home. By contrast, Texas not only recognizes, but imposes, this responsibility on a parent when his child "maliciously and willfully damages or destroys property"; in that event, even though the parent is not present, he can be held liable for such damages up to a maximum of $5,000. (Vernon's Ann. Civ. St., Art. 5923-1).

We respectfully submit that a statute which restricts exhibition of motion pictures to children on the ground of obscenity should define obscenity clearly enough so that those who administer it cannot confuse "obscenity" with their personal standards of what is suitable film fare for children. Some parents may decide that a given motion picture, though not obscene, is not suitable for their children. But the decision is one that they should make and enforce on an individual basis. Other parents may reach the opposite conclusion. Others may abdicate their responsibility. But this does not warrant the great risks to freedom of speech which inevitably follow from extending restrictions into the area of the non-obscene. This is particularly

so, since any such restriction of motion pictures will leave untouched many other, and more potent, influences on the development of a child's character and personality: the other media which expose him to the world and sex (television, the daily newspapers, national magazines and records), his day-to-day experiences beyond the walls of his home, and the fundamental influences which develop "anti-social traits . . . at an extremely early age, before the child is capable of intelligent comprehension of films." (EXCLUSION OF CHILDREN FROM VIOLENT MOVIES, 67 Columbia Law Review, 1149, 1155).

CONCLUSION

It is respectfully submitted that the judgment appealed from should be reversed.

Respectfully submitted,

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